

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
STATE OF WASHINGTON

CHESTINE EDGAR, et al,

Petitioner,

v.

CITY OF BURIEN,

Respondent,

**CASE NO. 11-3-0004**

**ORDER ON MOTIONS**

THIS Matter comes before the Board on the City of Burien's Motion to Dismiss the Petition for Review (PFR) in its entirety.<sup>1</sup> Petitioners Chestine Edgar, Robert Edgar, Robert Howell, Robbie Howell, Len Boscarine, Linda Plein, Sandy Glenhill-Young and the Lake Burien Neighborhood (collectively Petitioners) filed a response not only objecting to the motion but also seeking to strike it.<sup>2</sup> Burien filed a rebuttal to that response.<sup>3</sup>

In addition, Petitioners filed a Motion to Supplement the Record.<sup>4</sup> The City submitted a Response to Supplement the Record and the Petitioners filed a Rebuttal.<sup>5</sup>

**I. DISCUSSION AND ANALYSIS**

Petitioners filed a PFR on February 14, 2011 challenging the adoption on December 13, 2010 of City of Burien Ordinance No. 551. Although the Ordinance dealt with two proposed amendments, only proposed Amendment 2010-2 is the subject of Petitioners' appeal. This

<sup>1</sup> City of Burien Motion to Dismiss Petition for Review, filed April 11, 2011.

<sup>2</sup> Edgar's Response to City's Motion to Dismiss, filed April 21, 2011.

<sup>3</sup> City of Burien's Rebuttal to Petitioner's Response to Motion to Dismiss, filed April 28, 2011.

<sup>4</sup> Petitioners' Motion to Supplement the Record, filed April 11, 2011.

<sup>5</sup> City's Response to Motion to Supplement the Record, filed April 21, 2011; Petitioners' Rebuttal, filed April 28, 2011.

1 proposed Amendment was filed on June 1, 2010 by the Petitioners and sought to amend  
2 the land use designation (from Moderate Density Single Family Residential to Low Density  
3 Single Family Residential) and zoning (from RS-7200 to RS-12000) in the Lake Burien area,  
4 which encompasses approximately 33 acres.<sup>6</sup>

5  
6 After establishing a docket of amendments and holding public hearings and/or meetings  
7 before the Planning Commission and City Council, the City Council denied the proposed  
8 Amendment finding it did not meet the criteria for review of a proposed comprehensive plan  
9 amendment as set forth in Burien Municipal Code (BMC) 19.65.095.4 or the criteria for  
10 review of a proposed rezone in BMC 19.65.090.3.<sup>7</sup>

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13 **A. City of Burien's Motion to Dismiss the Petition for Review**

14 The City, in its Motion for Dismissal, sets forth two arguments as grounds for dismissal:

- 15 1. Untimely Filing of PFR - citing RCW 36.70A.290(2), the City states any appeal of the  
16 adoption of a comprehensive plan or development regulation must be made to a  
17 Growth Board within 60 days of publication and, this deadline was not met by the  
18 Petitioners.
- 19 2. Subject matter jurisdiction - citing RCW 36.70A.280(1), the City asserts the Board  
20 lacks jurisdiction to hear an appeal of the denial of a proposed GMA amendment by  
21 the City Council.

22 **Petitioners' Motion to Strike**

23 In their response, Petitioners argue the City did not provide a "total corrected" Motion to  
24 Dismiss until after the Board's stated deadline for submission, contending the conclusion  
25 page, which was subsequently amended by the City, should be grounds to strike the  
26 motion.<sup>8</sup> The City replies the conclusion page, which was provided one day after the  
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31 <sup>6</sup> Ordinance 551 (Exhibits and Attachments)

32 <sup>7</sup> Ordinance 551 (Whereas provisions plus Exhibits and Attachments)

<sup>8</sup> Petitioners' Response, at 2

1 original submission, was inadvertently omitted from the Motion to Dismiss and simply  
2 provides a concise summary of the City's position.<sup>9</sup>

3  
4 The Petitioners' Motion to Strike is **denied**. The City's Motion for Dismissal was timely filed  
5 and clearly articulated the basis for dismissal along with the requested result. As the City  
6 notes, the corrected page merely summarizes the City's stated position and its filing just one  
7 day later did not preclude the Petitioners from adequately responding to the Motion.  
8

9 Motion to Dismiss – Untimely Petition for Review

10 The City asserts its Comprehensive Plan has designated the Lake Burien area as Moderate  
11 Density Single Family Residential since 1999.<sup>10</sup> This designation was set forth on the Land  
12 Use Map adopted June 7, 1999, and published June 16, 1999.<sup>11</sup> Therefore, the City notes  
13 the 60-day appeal period has long since lapsed and the instant PFR is untimely. To support  
14 its motion the City cites two previous Central Puget Sound cases which the Board dismissed  
15 based on similar facts.<sup>12</sup>  
16

17  
18 Petitioners assert they have satisfied the 60-day appeal period for challenging Ordinance  
19 No. 551, which was adopted on December 16, 2010, by filing their PFR on February 14,  
20 2011.<sup>13</sup> Petitioners contend the issues raised by their PFR are not a challenge to the denial  
21 of their proposed amendment but, rather, their issues challenge the City's continued non-  
22 compliance with the GMA resulting from the denial.<sup>14</sup> Petitioners suggest that:<sup>15</sup>  
23

24 “[W]ithout a hearing by the GMHB, the City of Burien will be allowed to  
25 continue to deny protection to Critical Areas, water quality and wetlands and  
26 circumvent its responsibility to protect those Critical Areas, water quality and  
27

28 <sup>9</sup> City's Rebuttal, at 1-2

29 <sup>10</sup> City's Motion to Dismiss, at 2

30 <sup>11</sup> *Ibid*

31 <sup>12</sup> City's Motion to Dismiss, at 4 (Citing *Orchard Reach v. City of Fircrest*, CPSGMHB Case No. 06-3-0019,  
32 Order of Dismissal; *Cainion v. City of Bainbridge Island*, CPSGMHB Case No. 10-3-0013, Order on Motions to  
Dismiss).

<sup>13</sup> Petitioners' Response at 2

<sup>14</sup> Petitioners' Response, at 2

<sup>15</sup> Petitioners' Response, at 2-3

1 wetlands as mandated in RCW 36.70A.020(10), [and RCW]  
2 36.70A.030(5)(21).

3 Petitioners' briefing then goes on to articulate the varying ways they believe the City has  
4 failed to comply with the GMA, in regards not only to GMA but also to the Shoreline  
5 Management Act (SMA), RCW 90.58, and the State Environmental Policy Act (SEPA), RCW  
6 43.21C.<sup>16</sup>  
7

8 ***Board Discussion and Analysis***  
9

10 The language of RCW 36.70A.290(2) is clear:

11 (2) All petitions relating to whether or not an adopted comprehensive  
12 plan, development regulation or permanent amendment thereto, is in  
13 compliance with the goals and requirements of this chapter or chapter  
14 90.58 or 43.21C *RCW must be filed within sixty days after publication by*  
15 *the legislative bodies of the county or city.* (Emphasis added)  
16

17 Although Petitioners are correct that their PFR, filed on February 14, was within the 60-day  
18 appeal period for Ordinance No. 551, Petitioners apparently misunderstand which "action"  
19 taken by the City commences the appeal period and the requirement for the filing of a PFR.  
20 The Board acknowledges the Petitioners' concerns as to the environmentally-sensitive  
21 nature of their neighborhood but this does not eradicate the fact that what underlies these  
22 concerns is Petitioners' belief that it can be remedied through a down-zoning of the area.  
23 Therefore, from the PFR and the briefing, it is clear the Petitioners are directly challenging  
24 the Moderate Density land use designation for the Lake Burien area, a legislative action that  
25 occurred in 1999.  
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28 The 1999 action taken by the City to approve the Land Use Map and its subsequent  
29 publication is the time start date for the 60-day period for an appeal of the land use  
30 designation, not the date of the denial of a proposed amendment seeking to change that  
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<sup>16</sup> Petitioners' Response, at 3-14  
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1 designation. While the GMA grants the Board authority to hear all matters that a jurisdiction  
2 is not in compliance with the requirements of the GMA, the Legislature has established a  
3 deadline by which those challenges must be filed.<sup>17</sup> The GMA's requirement that a PFR be  
4 filed within 60 days of publication of the challenged legislative action has been strictly  
5 construed not only by the Board but also by the courts on numerous occasions.<sup>18</sup> The  
6 facts of this case do not warrant a different result.  
7

8 The City's Motion to Dismiss based on the argument that the PFR, in challenging a 1999  
9 land use designation, is untimely is **granted**.  
10

11 *Motion to Dismiss—Denial of Proposed Amendment*  
12

13 In addition to its claim that the PFR was untimely, the City asserts the Board does not have  
14 jurisdiction over the denial of a proposed amendment to a comprehensive plan. Citing RCW  
15 36.70A.280(1), RCW 36.70A.290(2), and WAC 242-02-220(5), along with numerous Growth  
16 Board decisions,<sup>19</sup> the City contends the Board has long held that rejected amendments to  
17 the comprehensive plan by a legislative body are not reviewable. The City also cites to the  
18 2008 Supreme Court decision in *Thurston County v. WWGMHB*,<sup>20</sup> to further support a  
19

20 <sup>17</sup> RCW 36.70A.280 and 36.70A.290.

21 <sup>18</sup> See e.g., *Thurston County v. WWGMHB*, 164 Wn.2d 329 (2008) (Noting the Legislature's recognition of the  
22 importance of finality in limiting the time for challenging a comprehensive plan to 60 days); *Torrance v. King*  
23 *County*, 136 Wn.2d 783 (1998) ( Stating that the GMA requires a petition for review "must be filed within 60  
24 days of the date the local government took the challenged action."); *Cainion v. Bainbridge Island*, CSPGMHB  
25 Case No. 10-3-0013, Order on Motions (January 7, 2011); *Cave/Cowan v. Renton*, CSPGMHB Case No. 07-3-  
26 0012, Order on Motions (April 30, 2007) and Order on Motions (May 24, 2007).

27 <sup>19</sup> *Kent C.A.R.E.S. v. City of Kent* CPGMHB Case No. 02-3-0015, Order on Motions, (November 27, 2002)  
28 *Cole v. Pierce County* CSPGMHB Case No. 96-3-0009c, (July 31, 1996) Final Decision and Order, *Torrance v.*  
29 *King County* CSPGMHB Case No. 960300038 Order Granting Dispositive Motion, ( March 31, 1997) and  
30 *Harvey v. Snohomish County* CSPGMHB Case No. 00-3-0008 Order on Dispositive Motions ( July 13, 2000).

31 <sup>20</sup> *Thurston County v. Western Washington Growth Management hearings Board*, 164 Wn.2<sup>nd</sup> 329, 344, 190.3d  
32 38 (2008). In this case, the question before the Court was whether a petitioner could challenge portions of a  
county's comprehensive plan that were not amended during the review mandated by RCW 36.70A.130, which  
requires jurisdictions to "review, and if needed, revise" their comprehensive plan and development regulations.  
Unlike the matter currently before the Board, there was not an expressed amendment filed and then  
subsequently denied by the county. Rather, the petitioner merely sought the ability to challenge unamended  
aspects of the comprehensive plan so as to ensure compliance with the GMA of those provisions, even if they  
had been adopted years prior. The court ruled contrary to this approach therefore limiting the scope of a  
"failure to revise" challenge so as to recognize that the original comprehensive plan is presumed valid upon  
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1 general rule against allowing appeals to the Growth Boards of denials of comprehensive  
2 plan amendments except in limited situations. The City asserts the history of consistent  
3 decisions by the Board and the Courts shows clear evidence that the denial of Petitioners'  
4 proposed amendment by the City Council is not appealable to the Board and should be  
5 dismissed for lack of jurisdiction.  
6

7 Petitioners, in their response, acknowledge that the Board has generally held it does not  
8 hear cases on comprehensive plan amendments that have been denied.<sup>21</sup> Petitioners then  
9 contend that this "is not a challenge that a portion of Ordinance 551 contained a denial but  
10 rather to challenge the continued non-compliance to the GMA by the City."<sup>22</sup> Petitioners  
11 then set forth varying arguments on how the City is failing to comply with the GMA, including  
12 the protection of critical areas, shoreline master programs, public participation,  
13 environmental review, and consistency not only with the City's Comprehensive Plan but with  
14 the evidence presented to the City Council.  
15  
16

17 In reply, the City reiterates its position that the Board does not have jurisdiction over the  
18 denial of comprehensive plan amendments nor does this case present issues related to the  
19 SMA or SEPA. In addition, the City contends the Petitioners' claims as to public  
20 participation and critical areas, specifically Best Available Science, have no merit and/or  
21 legal support.<sup>23</sup>  
22

### 23 ***Board Discussion and Analysis***

24 Although the Board has concluded *supra* that the PFR is untimely, due to the fact that it  
25 challenges a 1999 land use designation, there are occasions when an existing  
26 comprehensive plan or development regulation which has been in place for years can be  
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29 adoption and is conclusively deemed legally compliant if it is not challenged within 60 days. Therefore, the  
30 court limited such challenges to only those aspects of a comprehensive plan directly affected by new or  
31 substantively amended GMA provisions.

31 <sup>21</sup> Petitioners' Response, at 2

32 <sup>22</sup> Petitioner's Response to Motion to Dismiss at 2

<sup>23</sup> City's Rebuttal, at 2-4

1 challenged for failure to comply with the GMA. Specifically, the Board may review the denial  
2 of a comprehensive plan amendment when by such a denial the jurisdiction fails to fulfill an  
3 expressed, explicit mandate – either from the GMA<sup>24</sup> or the City’s own Comprehensive Plan  
4 – that requires adoption so as to achieve compliance with the GMA.<sup>25</sup> Since a denied  
5 amendment would equate to a denial by the City to comply with an expressed GMA  
6 mandate, the 60-day appeal period commences at the time of publication and therefore, in  
7 this case, Petitioners could potentially be afforded the opportunity to proceed.  
8

9  
10 However, in order to satisfy this exception, argument was needed so as to demonstrate that  
11 the City of Burien was *mandated to adopt* proposed Amendment 2010-2. From the briefing  
12 presented to the Board, no such argument was adequately developed. Petitioners  
13 acknowledge their issues are based on an ongoing concern for continued non-compliance  
14 with the GMA.<sup>26</sup> Petitioners express continued concerns with various environmental issues,  
15 such as lake water quality and wetlands, and the pending Shoreline Master Plan review.  
16 Petitioners do not, however, address the fundamental question put before the Board: what  
17 specific GMA deadlines or new requirements and/or Burien Comprehensive Plan provisions  
18 mandate the adoption of the Low Density land use designation and RS-12000 zoning to the  
19 Lake Burien area?  
20

21  
22 While Petitioners articulate many fundamental requirements of the GMA – from adequate  
23 public participation to the use of Best Available Science so as to protect the functions and  
24 values of critical areas – they fail to provide the linkage that results in a mandatory  
25 obligation for the City of Burien to revise its plan and apply a lower intensity land use  
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29 <sup>24</sup> Such a GMA mandate would be the duty to adopt plan elements by a statutory deadline or amendments  
required by a new or substantively-amended legislative provision.

30 <sup>25</sup> See e.g. *Cainion, v. City of Bainbridge Island*, CPSGMHB Case 10-3-0013, Order on Motions (Jan. 7, 2011);  
31 *Orchard Reach v. City of Fircrest* CPSGMHB Case No. 06-3-0019, Order of Dismissal at 5 (July 6, 2006); *Cole*  
32 *v. Pierce County*, CSPGMHB Case No. 96-3-0009c, FDO (July 1, 1996); *Bidwell v. Bellevue*, CPSGMHB Case  
No. 00-3-0009, Order of Dismissal (July 14, 2000).

<sup>26</sup> *Ibid*

1 designation, especially when the GMA seeks to promote infill development so as to prevent  
2 urban sprawl.

3  
4 The Board has repeatedly affirmed that an amendment offered and rejected by the  
5 legislative body is generally not appealable to the Board except in limited situations. The  
6 facts of this case do not support an exception to the general rule. The City's Motion to  
7 Dismiss based on the Board's lack of jurisdiction for the denial of a proposed amendment is  
8 **granted.**  
9

10 **B. Petitioner's Motion to Supplement the Record**

11 As noted *supra* the Board **grants** the City of Burien's Motion to Dismiss the Petition for  
12 Review. Therefore, given the lack of jurisdictional authority, the Board finds it unnecessary  
13 to respond to the Petitioners' Motion to Supplement the Record.  
14

15 **II. ORDER**

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17 The Board appreciates the efforts of the *pro se* Petitioners. The efforts of private citizens to  
18 come before the Board and argue their point of view is laudatory. The Board assumes in  
19 this case the citizens will continue to follow Burien's Shoreline Master Plan review and  
20 participate fully in opportunities afforded not only by the City but also by Washington State  
21 Department of Ecology.  
22

23 However, based upon review of the GMA, Board's Rules of Practice and Procedure, briefing  
24 and exhibits submitted by the parties, case law and prior decisions of the Board and having  
25 deliberated on the matter, the Board enters the following Order:  
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1. The City of Burien's Motion to Dismiss is **granted**.
2. Because of the granting of the City's Motion to Dismiss, the Board finds it unnecessary to enter a ruling on the Petitioners' Motion to Supplement the Record.
3. The Petition for Review in the *Edgar et al v. City of Burien* is **dismissed**.
4. CPSGMHB Case No. 11-3-0004 is **closed**.

DATED this 12th day of May, 2011.

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Dave Earling, Board Member

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Margaret Pageler, Board Member

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Joyce Mulliken, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.<sup>27</sup>

<sup>27</sup> Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).